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**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF CALIFORNIA**  
**(HON. THOMAS J. WHELAN)**

UNITED STATES OF AMERICA,

Plaintiff,

v.

DUNCAN D. HUNTER,

Defendant.

Case No. 18-CR-3677-W

**DEFENDANTS RESPONSE IN  
 OPPOSITION TO GOVERNMENT'S  
 MOTION TO ADMIT  
 COCONSPIRATOR STATEMENTS  
 AND SPOUSAL TESTIMONY**

DATE: July 1, 2019  
 TIME: 10:00 a.m.  
 COURTROOM: 3C  
 JUDGE: Hon. Thomas J. Whelan

Defendant DUNCAN D. HUNTER ("Mr. Hunter"), by and through his attorneys, Gregory A. Vega, Ricardo Arias, and Philip B. Adams, hereby submits this response in opposition to the Government's motion to admit coconspirator statements and spousal testimony.

**I. INTRODUCTION**

The Government may not introduce privileged communications exchanged between Mr. Hunter and his wife, Margaret Hunter ("Mrs. Hunter") unless and until it establishes that the alleged conspiracy actually existed. Furthermore, the Government

1 risks a mistrial for any privileged communications presented to the jury that were not  
2 made during and in furtherance of the alleged conspiracy.

## 3 **II. RESPONSE IN OPPOSITION**

4 The Court should not rely on the privileged marital communications offered by  
5 the Government when making its preliminary determination as to whether Mr. and Mrs.  
6 Hunter conspired to convert Mr. Hunter's campaign funds to their personal use. The  
7 Government has not provided sufficient evidence for a reasonable jury to find by a  
8 preponderance that such a conspiracy existed at all, let alone sufficient to establish  
9 precisely when the alleged conspiracy began. Until the Court is satisfied that a  
10 reasonable jury could find the existence of a conspiracy and that each statement falls  
11 within the conspiratorial period, it may not examine the privileged marital  
12 communications. Therefore, the Court should either deny the Government's motion or  
13 refrain from ruling on the motion until the Government provides further evidence  
14 showing the existence of the alleged conspiracy and establishing when it began.

### 15 **A. The Marital Communications Privilege Applies to All Statements Privately 16 Exchanged Between Mr. and Mrs. Hunter**

17 Federal Rule of Evidence 501 provides that, except as otherwise required by the  
18 Constitution, federal statute, or Supreme Court rule, the privilege of a witness shall be  
19 governed by the principles of common law as interpreted by United States courts "in the  
20 light of reason and experience." Fed. R. Evid. 501. The Ninth Circuit recognizes two  
21 privileges that arise from a marital relationship, the marital communications privilege  
22 and the spousal testimonial privilege. *United States v. Fomichev*, 899 F.3d 766, 771 (9th  
23 Cir. 2018). Both privileges require the existence of a valid marriage. *Id.*

24 The privilege afforded to marital communications extends to words and acts  
25 intended to be a communication. *United States v. Montgomery*, 384 F.3d 1050, 1056  
26 (9th Cir. 2004). The privilege applies only to confidential communications *Id.* Private  
27 communications between spouses "are generally assumed to have been intended to be  
28 confidential, and hence they are privileged." *Id.* The privilege "exists to insure that

1 spouses generally feel free to communicate their deepest feelings to each other without  
 2 fear of eventual exposure in a court of law.” *Fomichev*, 899 F.3d at 771. “The law  
 3 safeguards the confidentiality of marital communications not because it fails to  
 4 recognize the risk that such a privilege could be misused to obstruct justice, but because  
 5 privacy between spouses is so essential to the preservation of the marriage relationship  
 6 as to outweigh the disadvantages to the administration of justice which the privilege  
 7 entails. *Id* at 772. Either spouse may assert the marital communications privilege to  
 8 prevent testimony regarding communications between spouses. *Montgomery*, 384 F.3d  
 9 at 1058-59. Although the marital communications privilege does not apply to statements  
 10 made in furtherance of joint criminal activity, “communications made before a spouse  
 11 begins to participate in the criminal activity are privileged.” *United States v.*  
 12 *Montgomery*, 384 F.3d at 1060.

13 The Government does not dispute the validity of Mr. and Mrs. Hunter’s marriage.  
 14 Thus, for purpose of the Court’s analysis, all privately exchanged communications  
 15 between Mr. and Mrs. Hunter fall squarely within the scope of the marital  
 16 communications privilege. *See, Montgomery*, 384 F.3d at 1056. Furthermore, until the  
 17 Government establishes that the alleged criminal conspiracy existed and when it began,  
 18 all of the private marital communications remain privileged, and Mr. Hunter may assert  
 19 the privilege to prevent testimony by Mrs. Hunter regarding their privileged  
 20 communications. *See, Id.* at 1058-60.

21 **B. Mrs. Hunter’s Statements are Not Admissible under Rule 801(d)(2)(E) To**  
 22 **Prove the Existence of the Alleged Conspiracy or Mr. Hunter’s Participation**

23 In general, a coconspirator’s statement is admissible as non-hearsay under Rule  
 24 801(d)(2)(E) if: (1) it was made in furtherance of a conspiracy or common enterprise;  
 25 (2) it was made during the life of the conspiracy or enterprise; and (3) the defendant and  
 26 the declarant were members of the conspiracy or enterprise. *See generally Bourjaily v.*  
 27 *United States*, 483 U.S. 171, 175 (1987); *United States v. Layton*, 855 F.2d 1388 (9th  
 28 Cir. 1988). However, before a statement may be admitted under Rule 801(d)(2)(E), the

1 court must first determine whether a jury could reasonably find that a conspiracy existed  
 2 by a preponderance of the evidence. *See, Bourjaily*, 483 U.S. at 180-81. The existence  
 3 of a conspiracy and the defendant's involvement in it are preliminary questions of fact  
 4 that are resolved by the trial judge under Rule 104(a). *Id.* at 176.

5 Federal Rule of Evidence 104(a) empowers a court to decide any preliminary  
 6 question about whether a privilege exists, or evidence is admissible. In so deciding, the  
 7 court is not bound by evidence rules, *except those on privilege*. FRE 104(a) (emphasis  
 8 added); *See also, Bourjaily*, 483 U.S. at 176 (finding that the court is not bound by the  
 9 rules of evidence *except those with respect to privileges* when determining preliminary  
 10 questions concerning the admissibility of evidence) (emphasis added).

11 In *Bourjaily*, the Court considered whether Rule 104(a) permitted a court to  
 12 "make the preliminary factual determinations relevant to Rule 801(d)(2)(E) by  
 13 considering any evidence it wishes, unhindered by considerations of admissibility."  
 14 *Bourjaily*, 483 U.S. at 179. The *Bourjaily* Court observed that Rule 104(a) "on its face  
 15 allows the trial judge to consider any evidence whatsoever, *bound only by the rules of*  
 16 *privilege*," and thus held that a court may examine the alleged coconspirator statements  
 17 sought to be admitted in making a preliminary factual determination under 801(d)(2)(E).  
 18 *Id.* at 179-181 (emphasis added). However, the coconspirator statements involved in  
 19 *Bourjaily* were not subject to any evidentiary privileges and the coconspirators were not  
 20 spouses. Thus, this Court cannot base its decision based on factors that were not  
 21 considered in *Bourjaily* in making a factual determination under rule 801(d)(2)(E), as  
 22 the Government requests. Indeed, the *Bourjaily* court explicitly stated that in making  
 23 such a determination, a trial judge remained "bound only by the rules of privilege."  
 24 *Bourjaily*, 483 U.S. at 179.

25 Accordingly, one could reasonably argue that *Bourjaily* supports the proposition  
 26 that although a court may, in general, examine a coconspirator's statement in making a  
 27 factual determination under Rule 801(d)(2)(E), when the alleged coconspirators are  
 28 spouses, Rule 104(a) precludes the court from examining such statements because the

1 court remains bound the marital communications privilege. *See* FRE 104(a) (when  
 2 deciding whether evidence is admissible, the court is not bound by evidence rules,  
 3 *except those on privilege*) (emphasis added); *see also Bourjaily*, 483 U.S. at 176  
 4 (finding that the court is not bound by the rules of evidence when determining  
 5 preliminary questions concerning the admissibility of evidence *except those with respect*  
 6 *to privileges*) (emphasis added).

7 Therefore, the Court should not permit the Government to introduce privileged  
 8 communications exchanged between Mr. Hunter and Mrs. Hunter unless and until the  
 9 Government establishes that the alleged conspiracy actually existed and the statements  
 10 sought to be admitted were made during and in furtherance of the alleged conspiracy.

### 11 **III. CONCLUSION**

12 For the foregoing reasons, Mr. Hunter respectfully requests the Court deny the  
 13 Government's motion to admit coconspirator statements and spousal testimony.

14  
 15 Dated: June 28, 2019

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